REGD. GOA - 5

Panaji, 12th November, 1998 (Kartika 21, 1920)

SERIES II No. 33

OFFICIAL GAZETTE

GOVERNMENT OF GOA

SUPPLEMENT

GOVERNMENT OF GOA
Department of Labour

—

Order

No. CL/Pub-Award/97/2138

The following Award dated 28-4-1997 in Reference No. IT/21/94 given the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

R. S. Mardolker, Ex-Officio Joint Secretary (Labour).

Panaji, 5th May, 1997.

IN THE INDUSTRIAL TRIBUNAL

GOVERNMENT OF GOA

AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. IT/21/94

Shri P. N. Yadav
C/o the Secretary,
Goa Trade & Commercial Workers Union,
Velho Building, 2nd Floor,
Panaji- Goa. — Workman/Party I

v/s

M/s Paramount Security Services,
Near Don Bosco High School
Panaji- Goa. — Employer/Party II

Workman /Party I represented by Adv. Shri R. Mangueshkar.

Employer/Party II represented by Adv. Shri A. G. Kalangutkar.

Dated: 23rd April, 1997.

AWARD

In exercise of the powers conferred by clause (d) of Sub-section (1) of Section 10 of the Industrial Disputes Act, 1947, the Government of Goa by order dated 6-3-1993 bearing No. 28/20/93-LAB referred the following dispute for adjudication by this Tribunal.

" Whether the action of the Management of M/s Paramount Security Services, Panaji Goa, in terminating the services of Shri P. N. Yadav, Security Supervisor, with effect from 15-5-92 is legal and justified ?

If not, to what relief the workman is entitled ?"

2. On receipt of the reference, a case was registered under No. IT/21/94 and registered A/D notices were issued to the parties. In pursuance to the said notice, the parties put in their appearance. The Workman/Party I (For short "Union") was represented by Adv. Shri Mangueshkar and the employer/Party II (For short "Employer") was represented by Adv. Shri A. G. Kalangutkar. The Union filed its statement of claim which is at Exb. 3. The facts of the case in brief as pleaded by the Union are that Shri P. N. Yadav (For short "Workman") was employed with the employer from 23-12-85 and was posted at Vagator Beach Resort. That the Workman, thereafter worked at Goa Tourism Development Corporation, Calangute for one year; Hotel Goan Heritage for two years and he last worked at Hindustan Petroleum Corporation Ltd, Kundaim -Goa. That the workman worked with the employer for a total period of about 7 years and during the tenure of his service, he put in hard work and his service record was clear. That all of a sudden on 15th May, 1993, the employer terminated the services of the workman without assigning any reasons and neither one month' s notice was given to him nor he was paid compensation in lieu of notice, nor his legal dues were paid. That by letter dated 22nd September, 1992, the workman made a representation to the office of the Labour Commissioner. That the Asst. Labour Commissioner held conciliation proceedings and in the said proceedings the employer contended that the workman had committed various misconducts valued at Rs. 80,000/- and hence the action of the employer in terminating his services without show cause notice and enquiry is legal and justified. That the employer did not comply with the provisions of the Industrial Disputes Act prior to the termination of services of the workman. That prior to the termination of services, the employer ought to have given an opportunity to the workman to explain why punishment of termination of service should not be awarded to him. The Union contended that the termination of services of the workman by the employer is illegal and unjustified and hence he was liable to be reinstated in service with full back wages.

3. The employer filed the written statement which is at Exb. 4. The employer stated that the workman left the services of his own without informing the employer when posting order was given to him, and joined the services of some other employer. The employer stated that the workman was negligent and had committed misconducts, and had also committed theft thereby causing loss to the employer to the tune of Rs. 80,000/-. The employer denied that the applicant was employer with the employer since 23-12-85 and stated that he has been running the establishment since about two years. The employer denied that the services of the workman were terminated on 15-5-92 and stated that the workman left the services voluntarily without informing when posting order was given to him. The employer denied that the workman was hard working or that his service record was clean. The employer stated that the workman is liable to pay to the employer Rs. 82,600/- by way of counter claim towards damages suffered by the employer due to the theft, misconduct, irregularities and negligence of the workman. The Union thereafter, filed Rejoinder controverting the pleadings made by the employer in the written statement.

4. On the pleadings of the parties, following issues were framed at Exb.7.

1. Whether the Party I-Union proves that Party II did not give one month's notice and pay compensation to the workman Shri P. N. Yadav before terminating his services w.e.f. 15-5-92 ?

2. Whether Party I-Union proves that the action of the Party II in terminating the services of the workman Shri P. N. Yadav w.e.f. 15-5-92 is not legal and justified ?

3. Whether the Party II proves that the reference is not maintainable because the party I did not raise the dispute first ?

4. Whether the Party II proves that the workman Shri P. N. Yadav voluntarily absented himself from his service w.e.f. 15-5-92 ?

5. Whether the Party II proves that the workman Shri P. N. Yadav is gainfully employed ?

6. Whether the Party II proves that he is entitled to receive an amount of Rs. 82,600/- from the workman by way of counter claim towards damages suffered by the Party II on account of theft, misconduct, irregularities and negligence of the workman ?

7. Whether the workman Shri P. N. Yadav is entitled to any relief ?

8. What Award ?

5. My findings on the issues are as follows:-

Issue No. 1. In the affirmative
Issue No. 2. In the affirmative
Issue No. 3. In the negative
Issue No. 4. In the negative
Issue No. 5. In the negative
Issue No. 6. In the negative
Issue No. 7. As per para 8 below
Issue No. 8. As per order below

REASONS

Issue Nos. 1 & 2: In the present case, only the Union has led evidence by examining the workman. The employer did not lead any evidence nor cross-examined the workman. In the circumstances, the deposition of the workman has gone unchallenged. The contention of the Union is that the workman was employed with employer from 23-12-85 and he was posted at various places by the employer such as Goa Tourism Development Corporation at Calangute, Hotel Goan Heritage and lastly he worked at Hindustan Petroleum Corporation Ltd, Kundaim- Goa. The contention of the Union that the workman was employed with the employer from 1985 is proved by the certificates dated 7th February, 1987 and 9th March, 1989 Exb. W-1 colly which are issued by the employer. The certificate dated 9th March, 1989 Exb. W-1 colly clearly states that the workman was working with employer since four years prior to the issuing of the said certificate. The workman has also produced in the course of his deposition the receipt dated 23-12-1985 Exb. W-2 issued by the employer in acknowledgement of the receipt of the amount of Rs. 300/- towards the cost of the uniform material. This receipt also clearly proves that the workman was working with the employer since December, 1985. Therefore, from the above evidence it is established that the workman was employed with the employer from December, 1985.

Now, it is the contention of the Union that the employer terminated the services of the workman from 15-2-1992 without assigning any reasons and without giving him any notice or notice pay in lieu of notice and also did not pay him any compensation. This contention of the Union has been corroborated by the workman in his deposition. The workman in his deposition has stated that his last posting was at Hindustan Petroleum Corporation, Kundaim Goa, and that he was posted there by order dated 1-4-92. The workman has produced the said posting order at Exb. E-3. He has also stated that his services were terminated on 15-5-92 without assigning any reasons and he was neither given one month's notice nor was paid one month's pay in lieu of notice nor was paid any retrenchment compensation. He has further stated that he was in continuous service from December, 1985 without any breaks. As I have said earlier, the workman was not cross-examined by the employer and hence his statement which are made on oath have gone unchallenged. I have no reasons to disbelieve the said statements. The employer has not led any evidence to the contrary inspite of the opportunity given. Therefore, the Union has succeeded in proving that the employer terminated his services from 15-5-92 without giving him one month's notice and also without giving him one month's notice pay in lieu of notice and compensation. The employer in its written statement has set up the defence that the workman voluntarily remained absent from service when the order of posting was given to him, and that he absented himself from service w.e.f. 15-5-92. The defence set up by the employer amounts to the defence of abandonment of service by the workman. The Bombay High Court in the case of Gangaram K. Medekar v/s Zenith Safe Mfg. Co. & Others reported in 1996 (1) CLR 172 has held that the employer unilaterally cannot say that the workman was not interested in employment, and for this reason a domestic enquiry has to be held. In the present case, no domestic enquiry was held by the employer nor any evidence was led before this Tribunal to prove abandonment of service by the workman. Therefore the defence of the employer that the workman absented himself from service w.e.f. 15-5-92 stands not proved. It is to be seen now whether the termination of services of the workman w.e.f. 15-5-92 is legal and justified.

Section 2(oo) of the Industrial Disputes Act, 1947 defines retrenchment as follows:-

> "Retrenchment" means the termination by the employer of the services of a workman for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action, but does not include —
>
> a) Voluntary retirement of the workman or
>
> b) Retirement of the workman on reaching the age superannuation of the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

bb) Termination of the services of the workman as a result of the non-renewal of its contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf concerned therein; or

c) Termination of the services of a workman on the ground of continued ill health.

In the present case, neither the case of the workman falls within one of the exceptions laid down in Sec. (oo) of the I.D. Act, 1947 nor there is any evidence that the services of the workman were terminated by way of punishment. Therefore, the termination of the services of the workman amounts to retrenchment. Sec. 25 F of the I. D. Act, 1947 lays down the procedure for retrenchment. The said section lays down that the services of a workman who is in continuous service for not less than one year cannot be retrenched unless he has been given one month's notice or paid wages in lieu of such notice and he has been paid compensation at the rate of 15 days average wage per each year completed year of continuous service or any part thereof in excess of six months. These conditions are the conditions precedent to retrenchment. Sec. 25 B(2) of the I.D. Act, 1947 defines "Continuous Service". It states that a workman shall be deemed to be in continuous service under an employer for a period of one year if the workman during the period of 12 calendar months preceeding the date with reference to which calculation is to be made has actually worked under the employer for not less than 190 days in the case of workman employed below ground in a mine and 240 days in any other case. In this case, the Union has proved that the workman was employed from December 1985 and he worked till 14-5-92 without any break in his service. There is no evidence to the contrary from the employer. It is therefore established that the workman had worked for more than 240 days prior to the termination of his services. In the circumstances, the provisions of Sec. 25 F are attracted to the workman. There is no evidence that the workman was given one month notice, or was paid wages in lieu of such notice and was paid retrenchment compensation. The Supreme Court in the case of M/s Avon Services Production Agency Pvt. Ltd; v/s Industrial Tribunal Hariyana and others, reported in AIR 1979 SC 170 has held that giving of notice and payment of compensation is a condition precedent in the case of retrenchment and failure to comply with the provisions prescribing conditions precedent for valid retrenchment in Sec. 25 F renders the order of termination invalid and inoperative. In the circumstances, I hold that the workman has succeeded in proving that the employer did not give one month notice to the workman, nor paid wages in lieu of such notice nor paid retrenchment compensation. I further hold that the workman has succeeded in proving that the action of the employer in terminating his services from 15-5-92 is not legal and justified.

7. *Issue Nos. 3, 4, 5 and 6*: The employer in its written statement had set up the defences that the reference is not maintainable because the Union did not raise the dispute with the employer first; that the workman had abandoned his service; that the workman is gainfully employed and that the employer is entitled to receive Rs. 82,600/- from the workman by way of counter claim towards the damages suffered by the employer on account of theft, misconduct, irregularities and negligence of the workman. Since the burden was on the employer to prove the same, issue Nos. 3, 4, 5 and 6 were framed accordingly casting the burden on the employer to prove the said issues. The employer did not lead any evidence to prove the said issues. I, therefore hold that the employer has failed to discharge the burden case on it and hence I answer the issue Nos. 3, 4, 5 and 6 in the negative.

8. *Issue No. 7:* It has been held by me that the termination of the services of the workman by the employer w.e.f. 15-5-92 is illegal and unjustified. Now the question is what relief should be granted to the workman. The Union has claimed that the workman should be reinstated with full back wages. The ordinary rule is that when the termination of services of the workman is held to be illegal and unjustified, the workman should be reinstated with full back wages, unless there are circumstances which do not warranty reinstatement or full back wages. In the present case, I do not find any reason to deviate from this rule. There is no evidence on record to prove that the workman is gainfully employed from the date of termination of his service. The Supreme Court in the case of State Bank of India v/s M. Sundera Money reported in AIR 1976 SC 111, after holding that the termination of the services of the workman was illegal for not complying with the provisions of Sec. 25 F of the I. D. Act, 1947, awarded reinstatement to the workman with full back wages. In para 10 of the Judgment, the Supreme Court held as follows:

> "What follows ? Had the State Bank of India know the law and acted on it half month's pay would have concluded the story. But that did not happen and now some years have passed and the Bank has to pay for no service rendered. Even so, hard cases cannot make bad law. Reinstatement is the necessary relief that follows."

In the present case also, the employer terminated the services of the workman without complying with the provisions of Sec. 25 F of the I. D. Act, 1947. There is no evidence that the workman is gainfully employed after termination of his service. Therefore, in the facts and circumstances of the present case also, it is just and proper to award reinstatement to the workman with full back wages. In the circumstances, I hold that the workman is entitled to reinstatement with full back wages and all other consequential benefits. Hence, I pass the following order :

ORDER

It is hereby held that the action of the management of M/s Paramount Security Services, Panaji Goa, in terminating the services of the workman Shri P. N. Yadav, Security Supervisor, with effect from 15-5-1992 is illegal and unjustified. The workman Shri P. N. Yadav is ordered to be reinstated in service with full back wages and all other consequential benefits.

No order as to costs.

Inform the Government accordingly.

Sd/-
(AJIT J. AGNI)
Presiding Officer
Industrial Tribunal

Order

No. CL/Pub-Awards/97/7160

The following Award dated 12-12-1997 in Reference No. IT/36/97 given by the Industrial Tribunal, Panaji-Goa, is hereby published as

required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

R. S. Mardolker, Ex-Officio Joint Secretary (Labour).

Panaji, 4th February, 1998.

IN THE INDUSTRIAL TRIBUNAL

GOVERNMENT OF GOA

AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/36/97

Shri Premanand V. Naik,
Metawaddo, Collem Goa. ... Workman/Party I
V/s
M/s Shree Katyayani Oils Pvt. Ltd.,
Collem Industrial Estate,
Pikelwada, Collem Goa. ... Employer/Party II

Workman/Party I represented by Adv. Shri P. B. Devari.

Employer/Party II represented by Adv. J. Godinho.

Dated: 12-12-1997.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section-10 of the Industrial Disputes Act, 1947, the Government of Goa, by order No. IRM/CON/SG/(7)/95-96/2795 dated 27th June, 1997, referred the following dispute for adjudication to this Tribunal.

" Whether the action of the management of M/s Shree Katyayani Oils Pvt. Limited, Collem, in terminating the services of Shri Premanand V. Naik, with effect from 15-2-1995, is legal and justified?

If not, to what relief the workman is entitled ? "

2. On receipt of the reference, a case was registered under No. IT/36/97 and registered A/D notice were issued to the parties. In pursuance to the said notice, the parties put in their appearance. The workman/Party I (For short "Workman") filed his Statement of Claim at Exb. 3. The workman stated that he was working with the Party II (For short "Employer") from August 1981 and his services were terminated by the Employer w. e. f. 15-2-95. The workman stated that the termination of his services by the Employer is in contravention of the provisions of Section 25-F and 25-FFF of the I. D. Act, 1947. The workman contended that the termination of his services by the Employer is illegal and unjustified and therefore, he is entitled to reinstatement in service with full back wages and other consequential reliefs.

3. After the Statement of Claim was filed by the workman, the case was fixed for filing of the written Statement by the Employer on 2-12-1997. On the said date, Adv. Shri P. B. Devari, representing the workman and Adv. Shri J. Godinho, representing the Employer submitted that the dispute between the parties was settled and they filed an application at Exb. 5 praying that Consent Award be passed in terms of the settlement dated 2-12-1997, Exb. 6. I have gone through the terms of the settlement and I am satisfied that the said terms are certainly in the interest of the workman. I therefore accept the submissions made by the parties and pass the Consent Award in terms of the settlement dated 2-12-1997, Exb. 6.

ORDER

1. In settlement of all dispute and claims the employer agreed to pay to the workman as full and final settlement towards the legal dues, due and payable by the Employer.

2. The workman hereby agrees that the amount of Rs. 17,000/- (Rupees Seventeen Thousand only) received today by pay order dated 26-11-97 drawn on Centurion Bank Ltd. Margao, bearer No. 025592 is in full and final settlement towards all his claims and he has no other claim of whatsoever nature against the Employer including re-employment, re-instatement, wages, compensation, gratuity, Ex-gratia or any other dues.

3. The Employer has no claim of whatsoever nature against the workman.

No order as to costs.

Inform the Government accordingly about the passing of the Award.

Sd/-
(AJIT J. AGNI)
Presiding Officer
Industrial Tribunal

Order

No. CL/Pub-Awards/97/7161

The following Award dated 1-12-97 in Reference No. IT/8/95 given by the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act, 14 of 1947).

By order and in the name of the Governor of Goa.

R. S. Mardolker, Ex-Officio Joint Secretary (Labour).

Panaji, 4th February, 1998.

IN THE LABOUR COURT

GOVERNMENT OF GOA

AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Appln. No. IT/8/95

Shri Januario Cardozo & 3 Others,
Rep. By the General Secretary,
Gomantak Mazdoor Sangh,
Ponda -Goa. — Applicant
V/s
M/s Agencia E Sequeira,
Borim,
Ponda- Goa. — Opponent

Applicant - Absent

Opponent represented by Adv. Shri A. V. Nigalye.

Dated: 1-12-97.

ORDER

This is a complaint filed by the Applicants under Section 33-A of the Industrial Disputes Act, 1947. The applicants contended that the Opponent terminated their services in contravention of the provisions of Sec. 33 of the I. D. Act, 1947. The applicants filed the Written Statement denying that there was any contravention to the provisions of Section 33 of the I. D. Act, 1947 on its part. On the pleadings of the parties, issues were framed at Exb. 6 and thereafter, the case was fixed for the evidence of the applicants.

2. Today, when the case was called out, neither the applicants nor any person on their behalf remained present. The records of the proceedings show that the case was fixed for the evidence of the applicants on 25-1-96 and thereafter, it was adjourned several times at the request of the applicants. It is therefore obvious that the applicants are not interested in proceeding further with the complaint. In the circumstances, I have no other alternative but to dismiss the compaint for default of the appearance of the applicants. Hence, I pass the following order.

ORDER

The Complaint is dismissed for default of the appearance of the applicants.

No order as to costs.

Pronounced in the Open Court.

Sd/-
(AJIT J. AGNI)
Presiding Officer
Labour Court

Order

No. CL/Pub-Awards/98/10871

The following Award dated 19-8-1998 in Reference No. IT/67/95 given by the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisions of Section 17 of the Industrial Dispute Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

R. S. Mardolker, Ex-Officio Joint Secretary (Labour).

Panaji, 22nd September, 1998.

IN THE INDUSTRIAL TRIBUNAL

GOVERNMENT OF GOA

AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

No. IT/67/95

Shri Prashant B. Naik,
G. R. P. Colony, Block No. 2,
Room No. 5, Altinho,
Panaji-Goa. — Workman/Party I

v/s

M/s Goa Agro Oils Limited,
Kundaim Industrial Estate,
Kundaim, Ponda - Goa. — Employer/Party II

Workman/Party I represented by Adv. Shri R. Mangueshkar.

Employer/Party II absent.

Panaji, Dated: 19-8-1998.

AWARD

In exercise of the powers conferred by clause (d) of sub. section (1) of section 10 of the Industrial dispute Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 14-11-95 bearing No. 28/56/95-LAB referred the following dispute for adjudication by this Tribunal.

(1) Whether the action of the management of M/s Goa Agro Oils Ltd., Kundaim Industrial Estate, Kundaim-Ponda, Goa, in terminating the services of the workman Shri Prashant B. Naik, Junior Operator, with effect from 24-5-1994, is legal and justified ?

(2) If not, to what relief the workman is entitled ?

2. On receipt of the reference a case was registered under No. IT/67/95 and registered A/D notice was issued to the parties. In pursuance to the said notice, the parties put in their appearance. The workman-party I was represented by Adv. Shri R. Mangueshkar and the employer-party II was presented by Adv. Shri P. J. Kamat. The workman-party I (for short, 'workman') filed his statement of claim which is at Exb. 4. The facts of the case in brief as pleaded by the workman are that the employer-party II (for short, 'employer') is a company manufacturing and processing edible oil and is having its factory situated at Kundaim Industrial Estate, Kundaim, Goa. That the workman was appointed as a Jr. Operator on 21-10-93 on the fixed wages of Rs. 1000/- p.m. that the workman was issued an appointment letter dated 28-10-93 and as per the said appointment letter the appointment of the workman was subject to confirmation after probationary period of six months which was liable to be extended for a further period if found necessary by the employer. That the said appointment letter also stated that during the probationary period the services of the workman could be terminated by giving 24 hours notice. That the workman completed his probationary period of six months on 22-4-93 and on completion of the probationary period he was deemed to be a permanent workman. That the employer terminated his services by letter dated 23-5-94 w.e.f. 24-5-94 without giving any reasons and stated that the termination was as per clause No. 4 of the letter of appointment dated 28-10-93. That therefore the workman approached the employer and asked for the reasons for termination of his services but the employer did not do so and therefore he raised an industrial dispute before the Labour Commissioner, Panaji, Goa, on 22-8-94. That no Settlement could be arrived at in the conciliation proceedings held by the Assistant Labour Commissioner, Ponda, Goa, and he submitted a failure report to the Government. The workman contended that termination of his services by the employer is in violation of Sec. 25 F of the Industrial disputes Act, 1947. The workman contended that the termination of his services is illegal and unjustified and thereore he is liable to be reinstated in service with full back wages and continuity in service.

3. The employer filed written statement which is at Exb. 6. The employer stated that the reference is bad in law as it is made on the assumption of existence of an industrial dispute between the workman and the employer when in fact at the time when the reference was made no dispute existed between them. The employer admitted that the workman was appointed as a Jr. Operator from 21-10-93 on a consolidated wages of Rs. 1000.00 p.m., and that he was appointed on probation of 6 months vide letter dated 28-3-93 w.e.f., 21-10-93, and he was to continue on probation till he was confirmed in writing. The employer denied that the workman completed his probationary period on 22-4-94 as no letter was issued to him or that he is deemed to be a permanent workman. The employer stated that the workman continued as probationer since his services were not confirmed in writing by the employer. The employer stated that a certificate dated 30-6-94 was issued to the workman at his instance in order to help him in getting a job elsewhere. The employer stated that on 28-7-94 the workman approached the employer and accepted the full and final settlement of his legal dues and declared that he has no claim whatsoever including reinstatement. The employer stated that the services of the workman were terminated under clause 6 of the letter of appointment dated 28-10-93 and since the workman was on probation it was not necessary to give the reasons for his termination as per clause 6 of the said letter of appointment. The employer denied that they had violated the provisions of Sec. 25 F of the I.D. Act 1947. The employer stated that Section 25 F of the said Act do not apply to a probationer and also since the workman had not completed 240 days of work during the period of his service the question of complying with Sec. 25 of the Act do not arise. The employer denied that the termination of services of the workman is illegal and unjustified. The employer denied that the workman is entitled for reinstatement in service with full back wages and continuity in service as claimed. The employer stated that the workman was given an offer of re-employment vide letter dated 6-2-96 and was advised to report for work from 7-2-96 but the workman did not do so. The employer therefore pray that the reference be rejected. The workman thereafter filed rejoinder.

4. On the pleadings of the parties the following issues were framed at Exb.8.

1. Whether the Party I proves that the Party II terminated his services w.e.f. 24-5-94 without complying with the provisions of Sec. 25 F of the I.D. Act, 1947 ?

2. Whether the Party I proves that the action of the Party II in terminating his services w.e.f. 24-5-94 is illegal and unjustified ?

3. Whether the Party II proves that the reference is bad in law as no industrial dispute existed between the Party I and the Party II when reference was made ?

4. Whether the Party I is entitled to any relief ?

5. What Award ?

5. After the issues were framed the deposition of the workman was recorded and his cross examination was adjourned at the request of Adv. P. J. Kamat, the learned counsel for the employer. However, thereafter Adv. P. J. Kamat filed an application dated 6-6-97 praying that he be permitted to withdraw his vakalatnama filed on behalf of the employer. He produced the copy of the registered A/D notice dated 5-5-97 sent by him to the employer along with the A/D card. In the said notice Adv. Kamat had informed the employer that he would file an application before this Tribunal for withdrawal of his appearance on behalf of the employer on 6-6-97 at 10.30 a.m. and the employer was also informed that the case was fixed on 6-6-97 at 10.30 a.m. for cross examination of the workman. The application filed by Adv. Kamat was allowed and he was discharged from appearing on behalf of the employer on 6-6-97. Since the employer was duly notified by Adv. Kamat about the date of hearing fixed on 6-6-97 at 10.30 a.m. for cross examination of the workman, and none appeared on behalf of the employer on the said date, the cross examination of the workman was closed on 6-6-97. Subsequently after the evidence of the workman was closed the case was fixed for the evidence of the employer and since inspite of the opportunity given the employer did not lead any evidence, the evidence of the employer was closed on 3-11-97.

6. My findings on the issues are as follows:

Issue No. 1: In the negative
Issue No. 2: In the negative
Issue No. 3: In the negative
issue No. 4: In the negative
Issue No. 5: As per order below.

REASONS

7. *Issue No. 1*: It is the contention of the workman that the employer has terminated his services without complying with the provisions of Sec. 25 F of the Industrial Disputes Act 1947. In this case the workman has examined only himself in support of his case. He has not been cross examined as Adv. Shri Kamat who was representing the employer withdrew his wakalatnama after giving due notice to the employer, after the examination in chief of the workman was recorded, and the employer remained absent and hence cross of the workman was closed. The workman in his deposition has stated that he was employed with the employer as a Jr. Operator since 21-10-93 and his services were terminated w.e.f. 24-5-94. This means that he worked with the employer for about 7 months or so. Sec. 25 F of the Industrial Disputes Act 1947 lays down that a workman who has been in continuous service for not less than one year cannot be retrenched unless he has been given one month's notice in writing indicating reasons for his retrenchment or has been paid one month wages in lieu of such notice and also has been paid retrenchment compensation at the rate of 15 days average wages for every completed year of continuous service. Violation of this provision renders retrenchment or termination illegal. A workman will be covered under the provisions of this section only if he was in continuous service of not less than one year and if not the provisions of the said section will not be applicable to him. What is continues service of one year is defined under section 25 B(2) of the Industrial Disputes Act 1947. It states that a workman shall be deemed to be in continuous service of an employer for a period of one year if during the period of 12 calendar months preceeding the date with reference to which calculation is to be made, he has actually worked under the employer for not less than 190 days in case of workman employed below ground in a mine and 240 days in any other case. In the present case admittedly the workman was not employed in a mine. Therefore in order that the provisions of Sec. 25 F be made applicable to him he should have worked for 240 days within the period of 12 months prior to the date of termination of his service. The workman himself has stated in his deposition that he was employed from 21-10-93 and his services were terminated w.e.f. 24-5-94 which admittedly means that the workman had not worked for minimum 240 days with the employer as is required under Sec. 25 F of the I. D. Act 1947. This being the case, assuming that the termination off services of the workman amounted to retrenchment, the provisions of Sec. 25 F of the I. D. Act 1947 were not applicable to the workman at the time when his services were terminated. Therefore the question of complying with the provisions of Sec. 25 F of the Act, 1947 by the employer at the time of terminating the services of the workman did not arise. I, therefore hold that the workman has failed to prove that the employer terminated his services w.e.f. 24-5-94 without complying with the provisions of Sec. 25 F of the Industrial Disputes Act 1947. Hence, I answer the issue No. 1 in the negative.

8. *Issue No.2*: The contention of the workman is that he had completed the probation period satisfactorily on 22-4-93 and his probation period was not extended by the employer and therefore he was deemed to be permanent. His contention is that he ought to have been given notice under section 25 F of the Industrial Disputes Act 1947 and also

employer had to comply with the provisions of the said section at the time of termination of his services and having not done so, termination of his service is illegal and unjustified.

9. The workman himself has admitted in his deposition that he was appointed as a Junior Operator since 21-10-93 and was kept on probation for six months. He has produced the letter of appointment dated 28-10-93 at Exb. W-1 to that effect. According to him his probationary period expired on 22-4-93 and since the employer did not extend probation period further, he was deemed to be permanent. This contention of the workman is not correct. The Supreme Court in the case of Kedar Nath Bahl v/s The State of Punjab and others reported in AIR 1972 SC 873 has held that when a person is appointed as a probationer in any post and a period of probation is satisfied, it does not follow that at the end of said specified period of probation, he obtains confirmation automatically even if no order is passed in that behalf. The Supreme Court has further held that unless the terms of appointment clearly indicates that confirmation would automatically follow at the end of specified period or there is a specific service rule to that effect, the expiration of the probation period does not automatically lead to confirmation and if there is no specific order of confirmation, the person continues in his post as a probationer. The same principles are laid down by the Supreme Court in the case of Pratap Singh v/s Union Territory of Chandigarh and another reported in AIR 1980 SC 57. The Supreme Court in the case of State of Punjab v/s Dharan Singh, reported in AIR 1968 SC 1210 has held that an express order of confirmation is necessary to give the employee a substantive right to the post and from mere fact that he is allowed to continue in the post after the expiry of the specific period of probation, it is not possible to hold that he should be deemed to have been confirmed and the reasons for this conclusion is that, when, on the completion of the specific period of probation the employee is allowed to continue in the post without an order of confirmation, the only possible view to take in the absence of anything to the contrary in the original order of appointment or the service rules that the initial period of probation has been extended by necessary implication. Therefore, as per the above decisions of the Supreme Court, the law is that, when an employee is appointed on probation in a post, even if the probation is not extended after the period of the expiry of the specified period of probation, there is no automatic or deemd confirmation in service unless the terms of appointment indicate that the confirmation would follow automatically on the expiry of the specified period or the service rules specifically provide for the same. In the present case the appointment order which is on record does not indicate that the confirmation would be automatic on the expiry of the probation period. The workman has not shown the rules applicable to him which provide for confirmation in service on expiry of the probation period. Therefore there is no substance in the contention of the workman that he is deemed to be permanent because the employer did not extend his probation period. As per the law laid down by the Supreme Court in the above referred cases the workman continued to be on probation. The appointment letter Exb. W-1 provides for termination of the employment of the workman during the period of probation by giving 24 hours notice without assigning any reason. The workman has stated in his deposition that he was issued a letter on 23-5-94 stating that his services were terminated w.e.f. 24-5-94. The said letter is produced at Exb. W-2. The said letter of termination of service is in accordance with the provisions of the appointment letter Exb. W-1 and hence in my view it is legal.

10. The workman has contended that at the time of termination of his service he ought to have been given one month's notice and paid retrenchment compensation in terms of provisions of Sec. 25 F of the I. D. Act 1947. It is his case that having not done so his termination is illegal. This contention of the workman does not hold good. While deciding the issue No. 1 I have already held that the workman had not worked with the employer for 240 days as required under Sec. 25 F of the I.D. Act 1947. Therefore, the provisions of Sec. 25 F of the I. D. Act, 1947 are not applicable to the workman. Even otherwise, the provisions of Sec. 25 F are to be complied with by the employer only in case the services of the workman are retrenched. In the present case, as mentioned by me earlier, the workman continued to be on probation even after the expiry of the probation period in view of the law laid down by the Supreme Court in the case referred to. The Supreme Court in the case of M. Venugopal v/s Divisional Manager, Life Insurance Corporation of India, Machilipatnam, A.P. and another, reported in (1994) 2 SCC 323 has held that the termination of service of a probation falls within the exception (bb) to Sec. 2(oo) of the Industrial Disputes Act 1947 and therefore it is not "retrenchment" within the meaning of Sec. 2(oo). This being the case, even if there is non-compliance of the requirement of Sec. 25 F of the Industrial Disputes Act, 1947, such as not giving one month's notice or not paying retrenchment compensation by the employer, the order of termination of service of the workman would not be illegal or invalid. In my view therefore the workman has failed to prove that the action of the employer in terminating his services w.e.f. 24-5-94 is illegal and unjustified. In the circumstances I answer the issue No. 2 in the negative.

11. *Issue No. 3*: Since the employer had taken the defence that the reference is bad because no industrial dispute existed at the time when the reference was made, the burden was cast on the employer to prove the same and the issue No. 3 was framed accordingly. No evidence has been led by the employer to prove that no industrial dispute existed and hence the reference made by the Government is bad. In the absence of evidence this issue cannot be decided in favour of the employer. I, therefore hold that the employer has failed to prove that there did not exist industrial dispute when the reference was made and that therefore the reference is bad. In the circumstances I answer the issue No. 3 in the negative.

12. *Issue No. 4*: It has been held by me that the workman has failed to prove that the action of the employer in terminating his service w.e.f. 24-5-94 is illegal and unjustified. Consequently the workman is not entitled to any relief. I, therefore hold that the workman is not entitled to any relief and answer the issue No. 4 in the negative.

In the circumstances, I pass the following order.

ORDER

It is hereby held that the action of the employer M/s Goa Agro Oils Ltd., Kundaim Industrial Estate, Kundaim-Ponda, Goa, in terminating the services of the workman Shri Prashant B. Naik, Junior Operator, w.e.f., 24-5-94 is legal and justified. It is hereby further held that the workman Shri Prashant B. Naik is not entitled to any relief.

No order as to cost.

Inform the Government accordingly.

Sd/-
(AJIT J. AGNI)
Presiding Officer
Industrial Tribunal

Order

No. CL/Pub-Awards/98/11236

The following Award dated 2-12-1996 in Reference No. IT/11/96 given by the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

R. S. Mardolker, Ex-Officio Joint Secretary (Labour).

Panaji, 16th October, 1998.

IN THE INDUSTRIAL TRIBUNAL

GOVERNMENT OF GOA

AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

No. IT/11/96

Shri Shivanand Pandurang Naik,
Ponda-Goa. — Workman/Party I

v/s

M/s Elite Lodging & Boarding,
Bar & Restaurant,
Panaji-Goa. — Employer/Party II

Party I - Absent.
Party II - Represented by Adv. P. J. Kamat.

Panaji, Dated: 2-12-1996.

AWARD

In exercise of the powers conferred by clause (d) of Sub. Section (1) of Sec. 10 of the Industrial Dispute Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 5-2-96 bearing No. 28/63/95-LAB referred the following dispute for adjudication by this Tribunal.

(1) Whether the action of the management of M/s Elite Lodging & Boarding Bar & Restaurant, Panaji-Goa, in terminating the services of Shri Shivanand P. Naik, room-boy with effect from 14-1-95 is legal and justified?

(2) If not, to what relief the workman is entitled?

2. On receipt of the reference a case was registered under No. IT/11/96 and registered A/D notice was issued to the parties. The notice which was sent to party I (for short 'Workman') was returned unserved with postal endorsement, "Addresse left-return to sender". The party II (for short, 'Employer') was duly served with the notice and was represented by Adv. P. J. Kamat. Since the Regd. A/D notice sent to the workman was returned unserved on the ground that he had left the place of address, another notice under certificate of posting was sent to the workman. However, the said notice also was returned unserved with the endorsement, "Addresse left-Return to sender". The Workman had not intimated his present address to this Tribunal before leaving the earlier place of address. This being the case for all purposes the workman is deemed to be absent before this Tribunal in the above circumstances. Adv. P. J. Kamat, representing the employer submitted that the employer does not wish to file any claim statement as the burden is on the workman to prove the illegality of the order of termination. He submitted that since the workman had failed to discharge the burden, the reference had to be answered in favour of the employer.

3. The reference of the dispute has been made by the Government at the instance of the workman since he challenged the action of the employer in terminating his services with effect from 14-1-95 and as such he raised an industrial dispute. The Bombay High Court, Panaji Bench in the case of V. N. S. Engg., & Services v/s Industrial Tribunal, Goa, Daman and Diu and another reported in FJR Vol. 71 at page 393 had held that there is nothing in the Industrial Disputes Act, 1947 that indicates a departure from the general rule that he who approaches a Court for a relief should prove his case i.e. the obligation to lead evidence to establish an allegation made by a party is on the party making the allegation, the test being that he who does not lead evidence must fail. Their Lordships of the Bombay High Court further held that the provisions of Rule 10-B of the Industrial Disputes (Central Rules 1957) which requires the party raising a dispute to file a statement of demands relating only to the issue in order of reference for adjudication within 15 days from the receipt of the order of reference and forward copies to the Opposite party involved, clearly indicates that the party who raises the industrial dispute is bound to prove the contention raised by him and an Industrial Tribunal or Labour Court would be errings in placing the burden of proof on the other party to the dispute. In another case, i.e. in the case of V. K. Raj Industries v/s Labour Court (I) and other reported in 1981 (29) FLR 194, the Allahabad High Court has held that the proceedings before the Industrial Court are judicial in nature even though the Indian Evidence Act is not applicable to the proceedings before the Industrial Court, but the principles underlying the said Act are applicable. The High Court has further held that it is well settled that if a party challenges the validity of an order, the burden lies on him to prove the illegality of the order and if no evidence is produced the party invoking the jurisdiction must fail. The High Court has also held that if the workman fails to appear or to file written statement or produce evidence, the dispute referred by the Government cannot be answered in favour of the workman and he will not be entitled to any relief. I am entirely in agreement with the said decision of the Allahabad High Court.

4. In the present case, since the dispute was raised by the workman and that it is at his instance that the reference was made by the Government the burden was on the workman to prove that the action of the Employer in terminating his services with effect from 14-1-1995 was not proper and justified. There is no material before me to hold that the action of the employer in terminating the services of the workman was not justified and proper. In the absence of any evidence it cannot be held that the action of the Employer in terminating the services of the workman is illegal. In the circumstances, I hold that the workman has failed to prove that the action of the Employer is terminating his services w.e.f. 14-1-1995 is not justified and proper and hence I pass the following order.

ORDER

It is hereby held that the action of the Management of M/s Elite Lodging & Boarding, Bar & Restaurant, Panaji, Goa, in terminating the services of Shri Shivanand P. Naik, room-boy, with effect from 14-1-1995 is legal and justified.

No order as to costs. Inform the Government accordingly.

Sd/-

(AJIT J. AGNI)
Presiding Officer
Industrial Tribunal

Order

No. CL/Pub-Awards/98/11238

The following Award dated 2-12-1996 in Reference No. IT/12/91 given by the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

R. S. Mardolker, Ex-Officio Joint Secretary (Labour).

Panaji, 16th October, 1998.

IN THE INDUSTRIAL TRIBUNAL

GOVERNMENT OF GOA

AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

No. IT/12/91

Shri Vernon Lobo,
Margao-Goa. — Workman/Party I

v/s

M/s Himalaya Drug Co.,
Worli, Bombay. — Employer/Party II

Workman/Party I represented by Adv. B. O. Mendes.

Employer/Party II represented by Adv. G. K. Sardessai.

Panaji, Dated : 2-12-1996.

AWARD

In exercise of the powers conferred by clause (d) of Sub-Section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) of the Government of Goa by order dated 27-2-1991 bearing No. 28/5/91-LAB referred the following issue for adjudication.

> "Whether the action of the management of M/s The Himalaya Drug Company, Bombay, in dismissing Shri Vernon Lobo, Sales Medical Representative, with effect from 20-7-1990, is legal and justified.
>
> If not, to what relief the workman is entitled?"

2. On receipt of the reference, a case was registered under No. IT/12/91 and registered A/D notices were issued to the parties. In pursuance to the said notice, the parties put in their apearance. The Workman/Party I (For short, "Workman") filed the statement of claim at Exb.3. The facts of the case in brief as pleaded by the workman are that he was appointed as a Medical Representative of Himalaya Drug Company i.e. the Employer/Party II (For short "Employer") w.e.f., 10-4-1978 and for the very first day of his employment, the workman was posted at Margao Goa. That initially, the workman was required to work on a 45 days tour programme whereby he was to work for 30 days in Goa and the remaining 15 days in Sawantwadi District. Subsequently, due to certain difficulties faced by the workman, he was relieved of his earlier tour programme and he was asked to look after South Goa District only on a 45 days cycle which was thereafter reduced to a 20 days cycle in the year 1982. That from 1-4-88, the workman was given a tour programme of 25/26 working days i.e. a 30 days cycle for Vasco, Panaji, Ponda, Margao and its interiors. That the workman applied for leave in the month of October 1988 which was granted to him and accordingly, he went on leave from 25-10-88 to 13-11-88. The workman on 10-11-88 requested for extention of leave because of domestic problem, but he was asked to report at Bombay on 5-1-89 by telegram dated 31-12-88. That on 1-2-1989, the workman received a telegram from the employer stating that the extention of his leave was not sanctioned and he was asked to resume work immediately an per the new tour programme, which was drawn up by the Zonal Manager from Bombay. That, as per the new tour programme, he was required to work for 26 days in a month covering the area of Margao interiors in 3 days, Ratnagiri and interiors in 7 days, Chiplun and interiors in 7 days and Sawantwadi and interiors in 9 days and thereafter immediately rush back to Goa to resume work at Margao. The workman protested about this new tour programme to the Zonal Manager. However, the Zonal Manager who had a grudge against the workman kept asking him to come down to his office cum residence at Calangute every second day for confirmation about the change in tour. That thereafter in February 1989, the workman received a letter dated 23-2-89 asking him to hand over the promotional material to the Zonal Manager which was accordingly done by him. The workman thereafter received a telegram from the employer asking him to report on 28-2-89 at 11.00 a. m. for seeking certain personal explanations. That accordingly on 28-2-89, the workman rushed to Bombay and reported the office of the employer on 31-3-89. That the workman furnished the necessary information required by the employer. The workman was thereafter asked to come to the office on subsequent days and he was made to sit in the waiting hall without doing anything. As a result of this behaviour of the employer, the workman fell sick on 4-4-89 and he was under treatment till 3-3-90. That during the period that the workman was under treatment, he was transferred to Aurangabad. That thereafter, the workman received a charge sheet dated 14-3-90 from the employer and he submitted his reply to the same on 22-3-90. However, the employer informed the workman that his explanation to the charge sheet was not satisfactory and that enquiry would he held in Bombay on 24-4-90 at 11.00 a. m. The workman represented to the employer that due to the financial difficulties, he was not in a position to travel to and fro to Bombay and also bear his lodging and boarding expenses. That the employer sent a Demand Draft for Rs. 200/- to the workman alongwith a covering letter asking the workman to present himself in the enquiry on 17-5-90. That the workman again represented to the employer that as per the rules of the employer he was entitled to first class rail fare and allowances amounting to Rs. 381/- at the relevant time. It was also brought to the notice of the employer that return fare, lodging and boarding as also previous dues were not paid to him as a result of which the workman would not be attending the enquiry at Bombay. That subsequently, the workman received the dismissal order dated 20-7-90. The workman contented that no opportunity for attending the enquiry along with the defence assistance, witnesses and documents was afforded to him. The workman also contended that no notice from the enquiry officer was received by him, nor the copies of the documents and the report of the enquiry officer was furnished to him. The workman contended that he has been victimised for his trade union activities and more so because he had taken an active part in forming the Goa Medical Representatives Association and also because the Zonal Manager had a grudge against him. The workman therefore claimed that he was entitled to reinstatement with full back wages from 1-4-1989.

3. The employer filed the written statement which is at Exb.7. The employer raised the preliminary objection that the workman is not a "workman" under the Industrial Disputes Act, 1947 and therefore, this Tribunal has no jurisdiction to decide the dispute. The employer also contented that this Tribunal is not the appropriate forum for adjudicating the dispute as the workman was appointed in Bombay vide appointment letter dated 7-4-78 and that he was apid from the office at Bombay and also his activities were controlled by the said office. The Employer admitted that the workman was initially required to work for 30 days in Goa and the remaining 15 days in Sawantwadi District. The employer denied that the tour programme was subsequently altered due to the extensive area to be covered by the workman as also due to the language problem as alleged by the workman. The employer also admitted that the workman had applied for leave from October 1988 to November 1988 and that no further leave was sanctioned to the workman and he was asked to report at Bombay on 5-1-89. The employer stated that the workman failed to report at Bombay on 5-1-89 and also he failed to follow the tour programme which was issued to him. The employer further stated that the workman was again asked to report its office at Bombay on 31-1-89 at 3.00 p. m. and he was also further informed that further leave extention was not sanctioned to him and that he should resume the work. The employer stated that workman failed to report for duty and continued to remain absent unauthorisedly and without sanctioned leave. The employer denied that the workman had protested against the changed tour programme or that the said programme was not feasible on account of the language problem or

that there was deprivation of rest day or any material as alleged by the workman. The employer further denied that the Zonal Manager had any grudge against the workman.The employer also stated that by letter dated 23-2-89, the workman was reminded about the unauthorised absence and by letter dated 17-3-89, he was asked to report for duty and that inspite of the remainder, the workman failed to report for duty. Therefore, the employer sent a telegram dated 23-3-89 to the workman directing him to report at Bombay office on 28-3-89. That accordingly, the workman visited the Bombay office and admitted that his absence was unjustified. However, instead of reporting for duty, the workman sent a medical certificate dated 5-4-89 and thereafter did not report for work instead started indulging in character assasination of Mr. D'Souza, the Zonal Manager as also that of Marketing Operation Manager. The employer stated that inorder to give further opportunity to the workman, the employer assigned duties to the workman and he was posted at Aurangabad and he was asked to report at Aurangabad on 11-4-89. That inspite of the specific instructions given as regards the methodology to be adopted at Aurangabad, the workman flouted all instructions and failed to report for duty. The employer staied that the ground of sickness given by the workman was only with a view to set up a defence as the workman was involved in a business carried under the name and style "Chef Cold Storage". The employer stated that the workman was given sufficient opportunity to participate in the enquiry and denied that the workman was in financial difficulties as contented by him. The employer further contended that any amount of difficulties between the actual amount paid and the amount possibly due could have been raised by the workman before the enquiry officer or before the authorities in Bombay. The employer stated that no prejudice whatsoever was caused to the workman and the alleged financial difficulties were obviously not the real reason for not attending the enquiry.The employer denied that no opportunity was given to the workman for attending the enquiry alongwith the defence assistance, witnesses or that no copies of the documents were furnished to the workman. The employer also denied that no notice from the enquiry officer was received by him or that the enquiry officer's report was not furnished to him. The employer denied that the workman has been victimised for his trade union activities or that for his taking part in forming the Goa Medical Representatives Association or that the termination is on account of personal grudge of the Zonal Manager an contended by the workman. The employer denied that the workman was entitled to any relief as claimed by him. The workman thereafter filed rejoinder which is at Exb.6.

4. On the pleadings of the parties, following issues were framed at Exb.9.

ISSUES

1. Does Party II prove that Party I is not a workman under the provisions of Industrial Disputes Act?

2. Does Party II prove that this Tribunal has no local jurisdiction to try this case for the reason stated in para.1 (b) of its written statement?

3. Does Party I prove that the domestic enquiry held against him is not fair and proper?

4. Does Party II prove that Party I was guilty of misconduct alleged against him?

5. Whether the order of dismissal passed against Party I is legal and proper?

6. Is Party I entitled to any relief?

7. What award or order?

5. Since the employer had stated that this Tribunal had no jurisdiction to decide the reference, issue No. 2 was framed to that effect and it was tried as preliminary issue. After the parties had led evidence on the said issue my learned Predecessor by award dated 26-8-92 held that this Tribunal had no jurisdiction to decide the reference and hence the reference was rejected. Thereafter, the workman filed a Writ Petition against the said award in the High Court of Bombay, Goa Bench. The said Writ Petition bearing No. 492 of 1992 was disposed of by order dated 21st July, '95 allowing the Petition and setting aside the award dated 26-8-92 passed by this Tribunal. The Hon'ble High Court directed this Tribunal to make a fresh award on merits of the controversy between the parties.

6. The issue No. 1 which was framed in this case was as regards whether the workman is a "Workman" or not under the provisions of the Industrial Disputes Act, 1947. By order dated 24-10-95, this Tribunal held that the workman is a "Workman" under the provisions of the I. D. Act, 1947. Subsequently the issue No. 3 which was as regards whether the domestic enquiry held against the workman is fair and proper, was decided by this Tribunal by order dated 16-2-1996 holding that the enquiry held was not fair and proper and consequently the domestic enquiry was set aside and the parties were directed to lead evidence on the merits of the case. Accordingly, the parties led evidence on the merits of the case which is on record.

7. My findings on the remaining issues are as under:

Issue No. 4: In the affirmative.
Issue No. 5: In the affirmative.
Issue No. 6: in the negative.
Issue No. 7: As per order below.

REASONS

8. *Issue No. 4:* Adv. Shri G. K. Sardessai, the learned counsel for the employer submitted that the charges that are levelled against the workman are that the workman recorded in his reports that he had visited Dr. Malvia when he had not done so as per the complaint of Dr. Malvia dated 18-8-1988 and similarly he had recorded in his report that he had visited Dr. Manohar Desai at Panaji, when Dr. Dessai was not attending to his dispensary. He submitted that the other charges against the workman are that he had refused to comply with the transfer order issued to him; he had remained absent unauthorisedly and without leave; that he was in gainful employment during the period when he was in employment and he refused to comply with the transfer order. He submitted that the above said acts on the part of the workman constituted misconducts as mentioned in the charge sheet dated 14-3-90 Exb. E-15. As regards the charge that the workman had misrepresented and fabricated the reports in respect of the visits to Dr. Malvia and Dr. Manohar Desai, Adv. Shri Sardessai submitted that the workman, as a medical representative, has to visit the Doctor whose name is mentioned by him in his reports. he referred to Dr. Malvia's complaint and stated that as per the said complaint the workman had not visited him though the workman in his report had stated that he had visited the said doctor. As regards visiting Dr. Manohar Desai, Adv. Shri Sardessai submitted that the workman had falsely submitted his report stating that he had visited the clinic of Dr. Desai in the month of August and September 1988, it has come in the evidence of Mr. Khataukar, the witness for the employer that the Doctor Desai had not been visiting his clinic for about 3 to 4 months prior to his death as he was suffering from cancer and the witness Mr. Amonkar had also stated in his deposition that his father in law Dr. Desai had been bed ridden for about a month prior to his death and that he had died in the month of October, 1988. He submitted that the defence that is set up by the workman is that he had not met Dr. Desai but he had met the compounder and given

the materials to him. He further submitted that from the evidence on record it follows that the workman was not aware about the sickness of Dr. Desai or about his death and if he had visited Dr. Desai's Clinic in the month of August and September as stated by him he would have definitely come to know that Dr. Desai was sick, and was not attending to his clinic. According to Adv. Sardessai the above facts clearly showed that the workman had not visited the clinic of Dr. Desai in month of August and September, 1988. He submitted that there was therefore sufficient evidence to prove the charge of misrepresentation and falsification of records against the workman. As regards the charge of being on unauthorised leave and refusing to abide by the transfer orders, Adv. Shri Sardessai submitted that from the correspondence enter into with the management by the workman correspondence is on record, it is obvious that the workman had no desire to report outside the State of Goa and the excuses which he has given are that he was not conversant with the local language are without any substance. He submitted that it is in evidence that the workman is conversant with Hindi and English language and he had also worked at Sawantwadi, the local language of which is Marathi. He further submitted that even it is assumed that the workman was sick and not fit to resume work, still the workman did not make any efforts to report for work at Aurangabad after he was fit obviously because his trade and business of Chef Cold Storage should not suffer. Adv. Sardessai submitted that the workman was not suspended after he was charge sheeted but was required to report at Bombay and the contention of the workman that he had no resources to go to Bombay has not been accepted by this Court while dealing with the issue of fairness of enquiry. He submitted that the medical certificates which have been produced by the workman are nothing but to Circumvent the transfer order. He therefore submitted that there was sufficient evidence on record to prove the charge of remaining absent unauthorisedly and refusing to comply with the transfer order against the workman. As regards the charge against the workman that he was in gailful employment during the period when he was in employment with the employer, company, Adv.Sardessai submitted that there is sufficient evidence on record to show that the workman was engaged in the business of Chef Cold Storage and he was one of the partners. He submitted that the workman was engaged in the business of Cold Storage is established from the fact that he had initiated the business by applying for the licence; that he was the Manager; that his mother and cousin were the partners; that a power of attorney was executed in his favour by his mother to manage the business of Chef Cold Storage; that his mother was in Bombay and the partner Mr. Saldanha was always in intoxicated condition and hence he was helping them in entering into correspondence; that his mother had no experience in business; that all the business correspondence was signed by him; that there is a civil suit filed against him by MAFCO Ltd., on the assumption that he was a partner of Chef Cold Storage; that no reference is made by him in the statement of claim about his engagement in the business of Chef Cold Storage and made the reference to the Chef Cold storage only in his rejoinder; that he has concealed many facts before the Tribunal. Adv. Shri Sardessai submitted that it was fallacious to argue that unless and untill there was an effect on the sales of the products of the company, engagement in the trade or business during the course of employment is not misconduct. In this respect he relied upon clause 5 (B) of the Terms of Employment dated 7-4-1978. Adv. Sardessai therefore contended that the charge of gainful employment has been proved by the employer by sufficient evidence which is on record. He contended that the charges levelled against the workman are proved by the employer by leading sufficient evidence and the acts amounted to misconduct. He submitted that this being the case the order of dismissal passed by the employer is legal and justified.

Adv. Shri Mendes, the learned counsel for the workman on the other hand submitted that none of the charges levelled against the workman have been proved by the employer. As regards the charge of falsely recording in the reports about the visits to Dr. Manohar Desai and Dr. H. K. Malvia, Adv. Shri Mendes submitted that Dr. H. K. Malvia has himself admitted in his deposition that the purpose of his complaint was that the employer should instruct the workman to visit him in his office between 9 a. m. to 9.30 a. m. and that in case he was not in the office the medicines should be kept with his clerk. He submitted that the workman had replied to the said complaint but no action was taken by the management as admitted by Mr. D'Silva, the witness for the employer, and further he has admitted that the workman had met him on two or three occasions prior to his complaint dated 18-8-88 Exb.E-8. Adv. Shri Mendes submitted that from the evidence on record it is clear that the Doctors themselves ask the medical representatives to keep the medicinal samples with the clerk or the compounder and this was never objected to by the employer. With regards to the visit to the clinic of Dr. Manohar Desai, Adv. Shri Mendes submitted that the contention of the employer that Dr. Desai was not attending to his clinic for about three months prior to his death, is based on the information given by Mr. Khataukar as stated by Mr. D'Silva in his deposition. He referred to the deposition of Mr. Khataukar, the witness for the employer and submitted that he has stated in his deposition that he had made enquiry with the neighbours and he was told that Dr. Desai had died and about 3 to 4 months prior to his death, dispensary was closed. However, in his cross he stated that he does not recollect the names of the persons or the shops with whom he made enquiries, whereas Mr. Amonkar, the son-in-law of Dr. Desai has stated that the dispensary was closed after the death of Dr. Desai. Adv. Shri Mendes submitted that the contention of the employer that the workman submitted false reports cannot be accepted because as per the evidence on record the dispensary of Dr. Desai was open prior to his death and as per the practice, the workman was leaving the medicines, materials with the attendant who used to be in the dispensary. He therefore submitted that the employer had failed to prove the charge of dishonesty against the workman. As regards the charge of being on unauthorised leave, Adv. Shri Mendes submitted that this charge consists of two parts. One for the period from 25-10-88 to 13-11-89 and from 13-11-89 to 19-3-89. He submitted that as regards the period from 25-10-88 to 13-11-89 the leave for this period had been sanctioned by the employer and therefore it cannot be said that the workman was unauthorisedly absent for the above said period. As regards the period from 13-11-89 to 19-3-89 which is claimed to be unsanctioned leave by the employer, he submitted that the workman had sought extention of leave well before the sanctioned leave period had expired. He submitted that the employer had communicated the sanction of the leave for the period from 25-10-88 to 13-11-89 much later i.e. on 2-2-89 and the employer has not explained the delay in sanctioning leave nor has explained the procedure. He further submitted that even otherwise the wages of the workman for the period upto 30th March, 1989 was paid by the employer in April, 1989 and no claim for refund or recovery of the said wages has been made by the employer which now the employer claims to have been erroneously made. He therefore submitted that in the circumstances it cannot be said that the leave for the period from 13-11-89 to 19-3-89 is unsanctioned, as also, there is no mention in the Standing Orders or the Rules that sanction for leave is to be obtained before hand, and the facts on record do not show that there should be presanction. With reference to the period from 4-4-89 to 3-3-90 Adv. Mendes submitted that during this period the workman was sick and he had produced the medical certificate to that effect.He submitted that unless it was established by the employer that the justification for absence given by the workman was invalid or null and void, it cannot be held that the absence for the above said period is unauthorised. As regards the charge that the workman had refused to comply with the transfer order issued to him, Adv. Shri Mendes submitted that the authority of the employer to issue the orders is not disputed , but the same orders should be lawful and/or reasonable. He submitted that the question is whether the reasons for refusal to join the duties are justifiable and if so then the demand for joining duty is unreasonable though lawful. He further submitted that the Standing Order provide for treating the refusal as abandoning of duty if required; however, the employer has not resorted to this action deliberately and as the employer instead had regularised the absence and paid the leave wages,

it must be held that the refusal on the part of the workman to join the duty has been explained and condoned by the employer. Adv.Mendes further submitted that in the correspondence that is on record nowhere it is stated that the workman was required to report for duty at Bombay and it is stated for the first time in the deposition of witness Mr. D'Silva. He submitted that the workman was asked to report at Bombay not for joining duty at Bombay in connection with revised tour programme but for giving personal explanation. He contended that refusal to observe revised tour programme cannot be said to be illegal or bad because firstly as per the evidence of Mr. D'Silva, during the leave period no change in tour programme can be made and the workman has to report for duty on the same tour programme after he resumes the duty and secondly the transfer of the workman to Aurangabad was made during the period when the workman was sick and even when on the date when the transfer was to take effect i.e. in the month of May, 1990, the workman was still sick. Adv. Shri Mendes therefore submitted that there was no substance in the charge that the workman had refused to obey the orders of the employer. As regards the charge against the workman that he was gainfully employed when he was in employment of the employer he submitted that the said charge is baseless. He referred to clause 5 of the appointment letter Exb.E-14 and submitted that as per the said clause when no remuneration or wages is paid permission is not required. He submitted that from the said clause it is obvious that there is no prohibition for engagement in another job but with limitation that if there is remuneration or wages, previous permission is required. He submitted that there is no evidence or record to show that remuneration or wages were paid to the workman by Chef Cold Storage and Mr. Bilpodiwala, the witness for the employer, has not denied the suggestion that no remuneration was paid to the workman. He referred to the deposition of Mr. D'Silva and submitted that he has stated that he has no evidence to prove that the workman was being paid salary by Chef Cold Storage, nor Mr. Trevor Saldanha who was the Partner of Chef Cold Storage stated anything about the wages paid to the workman. He referred to the profit and loss accounts Exb.46 and submitted that the said accounts show that the amounts at point "A" are the profits of business shared annually by the partners and there is no reference to the workman in the same. Adv. Shri Mendes contended that even though it is taken that the workman was the "Manager" of Chef Cold Storage, it is an admitted position that after 23-10-82 he was not the Manager as he had resigned and the charge sheet issued on 14-3-90 states that he was in gainful employment as on the date when the charge sheet was issued to him, which is incorrect. He submitted that the employer has tried to raise the issue that the workman was the partner of Chef Cold Storage which could not be proved by the employer. He submitted that it is not in dispute that Chef Cold Storage is a partnership firm registered under sec. 69 of the partnership Act. He referred to the extract from the register of partnership firm Exb. W-13, the xerox copy of the visiting card Exb. H-9 and E-6, and submitted that in none of the above documents it is mentioned that the workman is the partner and this fact is admitted by the witnesses Mr. Fernandes and Mr. Bilpodiwala. He further submitted that there is also no evidence that the workman had committed acts subversive of discipline or there was gross negligence on his part. In this respect relied upon the deposition of Mr. D'Silva, the witness for the employer. Adv. Shri Mendes therefore contended that the employer had totally failed to prove the charges levelled against the workman and consequently misconduct was not proved. He submitted that in the circumstances the termination of the services of the workman is illegal and justified and hence the workman was liable to be reinstated with full back wages.

9. I have carefully considered the arguments advanced by both the learned counsels. The charge sheet issued to the workman has been produced at Exb. E-15. There is no dispute as regards the charges levelled against the workman which are (1) That there was a complaint from Dr. Malvia dated 18-8-1988 that the workman had not visited him for six months though he had reported in his reports that he had visited the said Doctor and further that he had not visited Dr. Manohar Desai at Panaji in the month of August and September 1988 though he had reported in his reports that he had done so when the said doctor had not attended to his dispensary/clinic in the said months (2) That he had remained absent unauthorisedly and without leave (3) That he refused to comply with the transfer orders issued to him and (4) That he was gainfully employed when he was in the employment of the employer. The above said acts on the part of the workman according to the employer amounted to misconduct as specified in the charge sheet. It is to be seen whether the said charges levelled against the workman have been proved by the employer by sufficient evidence. The first charge against the workman is that he misrepresented the employer that he visited the Doctors namely Dr. Malvia and Dr. Manohar Dessai and fabricated the reports when infact he had not done so. With reference to Dr. Malvia, the employer has relied upon the complaint of Dr. Malvia and he has been also examined as a witness. The complainant Dr. Malvia has stated that the workman had visited his office only once after joining the services. However, in his deposition, in his cross-examination he has admitted that the workman had met him two or three times prior to his making the complaint. He has further stated in his cross examination that the purpose of his making the letter dated 18-8-88 Exb. E-8 was that the workman should visit him between 9 a.m. to 9.30 a.m. as thereafter he was leaving the office on tour. He has also stated that he had mentioned in the said letter that in case he was not in the office, the workman should keep the medicines with his clerk. The workman in his deposition has stated that he had received a letter dated 1-11-88 from Mr. Chaya, the Marketing Manager of the employer, referring to the complaint received from Dr. Malvia and asking to give explanation. The workman has produced the letter dated 8-11-88 Exb. E-16. In the said letter the workman has denied that he had not visited Dr. Malvia. He has given the dates on which he visited Dr. Malvia and on two occasions he was accompanied by the Regional Manager Mr. Khataukar. The workman stated in his deposition that he never received any further correspondence from the employer in the matter. The above statements of the workman have not been disputed by the employer in his cross-examination. The workman has further stated in his deposition that in case the doctor was not available in his clinic he used to leave the promotion literature and the medicine samples with his attendant or the compounder. There is no suggestion to the workman that he was not supposed to leave the medicine samples and literatures with the clerk or the attendant in the absence of the Doctor. From the complaint of Dr. Malvia and his deposition it is clear that the said Doctor wanted that the workman should meet him personally before 9.30 a.m. and if he was not available he should leave the medicine samples and literatures with his clerk. From the above evidence discussed by me it is evidence that the workman had visited Dr. Malvia on three occasions and whenever he was not available, he used to leave the medicine samples and the promotional literature with his attendant or the clerk. This being the case I do not agree that they is any misrepresentation or fabrication of the reports on the part of the workman with reference to the visit to Dr. Malvia. As regards the visit to Dr. Manohar Desai, the allegation are that Dr. Manohar Desai was sick and was not attending to his clinic for about three to four months prior to his death, and therefore the report of the workman that he had visited the clinic/dispensary of Dr. Manohar Desai in the month of August and September, 1988, is false. The employer has relied upon the evidence of Mr. Khataukar and Mr. Amonkar, the son-in-law of Dr. Manohar Desai in this respect. Mr. Khataukar in his deposition has stated that on learning about the death of Dr. Desai from Mr. D'Souza the Zonal Manager, he visited the dispensary of Dr. Desai at Panaji and on enquiries from the neighbours he learnt that Dr. Desai's dispensary was closed about 3 to 4 months prior to his death, as he was suffering from Cancer. However, this statement of Mr. Khataukar is contradictory to the statement of Mr. Amonkar, who is the son-in-law of Dr. Desai. Mr. Amonkar in his cross examination has stated that Dr. Desai did not have a nurse in his dispensary but had an attendant. He has stated that the said dispensary was closed after the death of Dr. Desai which occurred in the month of October, 1988. He has further stated that Dr. Desai was

bed ridden one month prior to his death. The statement of Mr. Amonkar is to be believed rather than the statement of Mr. Khataukar because Mr. Amonkar is the son-in law of Dr. Desai and he has personal knowledge whereas Mr. Khataukar's statement is based on the enquiries made by him with the neighbours whose names he does not remember. Therefore the contention of the employer that the dispensary of Dr. Desai was closed for about three to four months prior to his death is disproved by their own witness who is a material witness. This being the case it cannot be said the workman submitted false reports Exb. E-11 colly that he visited Dr. Desai in the month of August and September, 1988. Mr. Amonkar in his cross-examination has stated that Dr. Desai had an attendant in his dispensary. The workman in his deposition has stated that whenever the Doctor was not available he used to leave the medicine samples and the promotion literatures with the clerk or the attendant, and there is no suggestion from the employer to the workman that he was not supposed to do so. The witness Mr. D'Silva in his cross-examination has admitted that sometimes the medical representatives leave the medicine samples, literatures, gifts and other materials with the attendant of the clinic or the staff in case the Doctor is not available at that time. There is nothing on record to show that any warning was given to the workman or any instruction were given to him that he should not leave the medicine samples, literatures etc., with the staff or the attendant of the Doctor in case he was not available. From the evidence which the employer has tried to bring on record it is clear that the employer wanted to prove that since the dispensary of Dr. Desai was closed for three to four months prior to his death, the workman could not have visited his dispensary in the month of August or September, 1988 and therefore his reports in this respect are false. However, from the evidence on record which is discussed above, it can be seen that the employer has failed in this respect as Mr. Amonkar, the son-in-law of Dr. Desai has stated the dispensary of Dr. Desai was closed after his death which occurred in the month of October, 1988. In the circumstances, I hold that the employer has failed to prove the first charge against the workman that he misrepresented about the visits to Dr. Malvia and Dr. Desai and also that he fabricated the reports.

The second charge against the workman is that he had remained absent unauthorisedly and without leave. From the evidence on record it can be seen that the leave period consists of three parts, namely from 25-10-88 to 13-11-88; from 14-11-88 to 19-3-89 and from 4-4-89 to 3-3-90. Admittedly the leave period from 25-10-88 to 13-11-89 was sanctioned by the employer. Therefore, this leave period cannot be said to be unauthorised. Therefore it is to be seen whether the absence of the workman for the period from 14-11-89 to 19-3-89 and 4-4-89 to 3-3-90 is unauthorised and without leave. As regards the leave period from 14-11-88 to 19-3-89 it is the contention of the employer that this leave period was never sanctioned. In this respect the employer has relied upon the telegrams Exb. E-21, Exb. E-24, Exb. E-25, Exb. 31 colly and the letters dated 2-2-89 Exb. E-27, dated 3-2-89 Exb. E-28, dated 23-2-89 Exb. E-29 dated 17-3-89 Exb. E-30 colly. According to the employer the above said letters, telegrams were sent to the workman informing him that his leave extension as sought by him by various letters was not sanctioned. It is the contention of the employer that the workman was not granted the extension of leave from 14-11-88 to 19-3-89, and he was informed about the same by various letters and telegrams, and therefore his absence for the above said period is unauthorised. The evidence on record shows that the workman had applied for extension of leave after leave initially sanctioned upto 13-11-88 had expired. The evidence on record also shows that the employer by telegrams and letters had informed the workman that his leave was not extended and he was asked to report for work. The workman had asked for the extension of leave on the ground of serious domestic problems, as can be seen from the letter dated 2-1-89 Exb. E-22. It is not in dispute that the workman did not report for work till 19-3-89. The workman has contended that there is no mention in the standing orders that sanction for the leave to be obtained before hand. According to me this is immaterial in the facts of the present case because in the present case the workman had applied for the extension of leave and he was informed that extension of leave was not granted to him. However, there is substance in the contention of the workman. that since the employer paid to him the wages for the period upto 30th March, 1989, it cannot be said that the leave for the period from 14-11-89 to 19-3-89 was unauthorised. The workman in his deposition has stated that he was paid his salary from October 1988 to March 1989 which included the period when he was on leave. He has further stated that he was never informed that the salary which was paid to him till March, 1989 was paid by mistake nor any attempts were made by the employer to recover the said amount from him. This part of the statement has not been challenged by the employer in the cross-examination of the workman but it was suggested that he was paid the same by mistake. Payment of the salary to the workman has been admitted by the employer in the charge sheet issued to him. However, there is no evidence on record to show that it was paid by mistake or that attempts were made to recover the amount from the workman.Therefore the inference which can be validly drawn is that the absence of the workman from 14-11-88 was subsequently condoned by the employer and therefore he was paid wages upto 30th March, 1989. If the absence was not condoned the employer would not have paid the wages to the workman for the period when he was on leave which according to the employer was not sanctioned. In the circumstances, I am of the view that it cannot be said that the period of leave from 14-11-89 till 19-3-89 was unauthorised. The period of leave which now remains to be considered is from 4-4-89 to 3-3-90. According to the workman during this period he was sick and therefore he could not report for work. The workman has contended that he fell sick as a result of the treatment to which he was meeted out when he met Mr. Chaya the Marketing Manager, at Bombay on 1-4-1989. He has contended that he continued to be sick till 3-4-90. In support of the contention that he was sick, the workman has produced the medical certificates dated 4-4-89 and 3-3-90 Exb. W-1 colly and W-16 colly respectively. Admittedly this leave period of the workman has not been sanctioned by the employer. The contention of the workman is that since the employer had not established that the justification given by him for his absence was invalid or void, it cannot be said the absence for the said period was unauthorised. I do not agree with this contention of the workman. There is a letter dated 11-4-89 from the partner of the employer to the workman which is produced at Exb. E-34. In the said letter the employer had already disagreed with the contention of the workman that he was sick and had stated that he was seen at the Nagpur Airport on 7th April, 1989. This shows that the employer had disbelieved that the workman was sick. From the charge sheet Exb. E-15 as well as from the written statement filed by the employer it can be seen that the employer never admitted that the workman was sick from 4-4-89. Mr. Russel D'Silva, the witness for the employer, in his cross-examination had denied the suggestion that the workman underwent mental depression because of the rude treatment meeted out to him by Mr. Chaya. He also denied the suggestion that the workman could not report for work after 4-4-89 because of his sickness. In the cross examination of the workman it was suggested to him that the medical certificates which were produced by him were false. In these circumstances it was not for the employer to establish that the justification given by the workman is invalid or void, but it was for the workman to establish the justification for his absence for the period from 4-4-89 to 3-3-90 by leading evidence on his sickness. The workman ought to have examined the Doctors who had issued certificates in support on his contention that he was sick for the above said period more so when the employer had disputed the medical certificates. However, the workman did not do so, Therefore merely production of the medical certificates by the workman would not by itself prove that he was sick, more so, when the employer had doubted his sickness and the medical certificates. In the circumstances I hold that the employer has succeeded in proving that the absence of the workman for the period from 4-4-89 to 3-3-90 is unauthorised as the employer never sanctioned his leave for the said period nor the

workman could justify his absence by proper evidence. I, therefore, hold that the employer has partly succeeded in proving this second charge against the workman which is unauthorised leave for the period from 4-4-89 to 3-3-90.

The third charge against the workman is that the workman refused to obey the transfer order issued to him. The contention of the employer is that the workman was transferred to Aurangabad and he refused to obey the said orders because his business of Cold Storage would suffer. The employer has contended that the excuses of sickness and not being conversant with the local language given by the workman are the false excuses. The workman on the other hand has contended that the transfer order was issued to him when he was sick and the said order was to take effect in the month of May, 1990 i. e. during the period of his sickness. The workman has contended that though the authority of the employer to issue transfer order is not disputed, still the order should be lawful and /or reasonable. The workman has contended that the transfer order issued by the employer is unreasonable because it was issued during the sickness of the workman and hence he was justified in refusing to join the duties at Aurangabad. It is not in dispute that the workman was informed by letter dated 11-4-89 Exb. E-32 that he was transferred to Aurangabad w.e.f., 2nd May, 1989 and this was done because he had strained relations with the Zonal Manager at Goa. The workman has admitted in his cross-examination that as per the appointment letter issued to him he could be transferred in any part of India by the employer. The evidence on record shows that workman has taken contradictory stand as regards his transfer to Aurangabad. In the cross-examination of Shri Silva, the witness for the employer, the workman has suggested that he had objected to his transfer to Aurangabad on the ground that he had no communication skill to promote sales of the products of the employer outside Goa, and that he was being transferred deliberately knowing fully well that he had no communication skill to promote sales of the products of the employer outside Goa. However, in his cross-examination, the workman stated that he did not report at Aurangabad because he was not provided with transport or dearness allowances. In the rejoinder filed by the workman, the workman stated that the sole purpose of his transfer was to create a situation thereby forcing him to resign, and also that no dearness allowance or transport allowance was paid to him to enable him to take up the job at Aurangabad. then, the employer has produced the letter dated 22-5-89 Exb. E-35 written by the workman to the partner of the employer. In the said letter the workman has made a request that he should be allowed to work at Margao only. There is no reference in the said letter or in the above evidence or in the rejoinder filed by him to his sickness or that his transfer should be canelled on account of his sickness. Besides while discussing the second charge against the workman I have held that the workman has failed to prove that his absence from 4-4-89 was on account of sickness and consequently I have held that his absence from 4-4-89 to 3-3-90 is unauthorised. This being the case the contention of the workman that he was justified in refusing to obey the transfer order because it was issued during the period of his sickness or that for the same reason the order of tranfer is unreasonable cannot be accepted. I, therefore, hold that the employer has succeeded in proving this third charge against the workman that he disobeyed the order of transfer issued to him.

The fourth and the last charge against the workman is that he was gainfully employed when he was employment of the employer. The contention of the employer is that during the time when the workman was working with the employer, he was also engaged in the business of Chef Cold Storage at Margao being the partner of the same. In support of this charge the employer has examined Mr. Bilpodiwala, Mr. Willanova Fernandes, Mr. Trevor Saldanha and Mr. Suresh Raje. The workman has denied this charge and has taken the stand that he has helped the partners of Chef Cold Storage in entering into corresponence with third parties because Mrs. Gladys Lobo who was one of the partners is his mother and the other partner Mr. Trevor Saldanha is his cousin. The employer has sought to argue that the engagement of the workman in the business of Chef Cold Storage is established from the fact that he had applied for the licence with the Municipality; he was the Manager; his mother and cousin were the partners; his mother had executed power of attorney in his favour, Mr. Trevor Saldanha was always in intoxicated condition and hence he was helping him in entering into correspondence and also used to sign the correspondence; a civil suit is filed against him by MAFCO Ltd., on the assumption that he was a partner of Cold Storage. Mr. Bilpodiwala in his deposition has stated that he had visited the shop "Chef Cold Storage" at Margao some where in the month of March, 1990 and he was told by one Mr. Gabriel who was in the shop, that the workman was a partner in the business of Chef Cold Storage. He has produced the visiting card Exb. E-6, which is the xerox copy of the visiting card given to him by Mr. Gabriel. According to him the said visiting card stated that the workman was the partner of Chef Cold Storage. However, in the xerox copy of the visiting card Exb. E-6 there is no mention of the word "partner". When this was brought to the notice of the witness Mr. Bilpodiwala in his cross-examination, stated that the word "partner" was not got printed at the time when the xerox copy of the visiting card was taken. This explanation is obviously ridiculous. It is known that the xerox copy of the document is the exact replica of the original. One fails to understand as to how only the word "partner" is not printed when the xerox copy was taken. According to Mr. Bilpoliwala he got the information that the workman was a partner in the business of Chef Cold Storage, from Mr. Gabriel who was working in the shop. This Mr. Gabriel would have been a material witness. But he has not been examined. Mr. Bilpodiwala in his cross-examination has further stated that he does not know as to how much wages was being paid to the workman as a partner of Chef Cold Storage or how much remuneration he was getting out of the business of Chef Cold Storage. The letters Exb. E-3 colly and the bill Exb. E-4 produced by him have been disputed by the workman and it has been stated that they are fabricated by the employer. Then there is the evidence of Mr. Willanova Fernandes, who runs a private investigation agency known as "Cobra Detective and Security Services" and he was engaged by the employer to investigate whether the workman was gainfully employed. He has stated that he has employed persons to carry out investigations and that in the present case one Mr. Vasudevan had carried out the investigations. He has submitted the report Exb. E-9 colly. In the

cross- examination he has stated that his report is not based on his personal knowledge but is based on the investigation done by Mr. Vasudevan. He has further stated that Mr. Vasudevan had submitted his report to him, but he did not submit this report to the employer. Infact this report of Mr. Vasudevan is important as it in the first hand report; but this report has not been produced either before the employer or before this court. Also, said Mr. Vasudevan has not been examined. In the circumstances much weight cannot be given to the report produced by Mr. Fernandes. Further Mr. Fernandes has stated in his cross-examination that inquiries were made with the Registrar & Firms and on enquiries his Agency learnt that the workman was not the partner of the firm Chef Cold Storage but was the Manager. However, he has further stated in his cross that as per the report submitted by him it was his opinion that the workman was the partner of Chef Cold Storage at the time when investigation was carried out. This opinion of Mr. Fernandes is without any basis. I have gone through the report Exb. E-9 colly. In the said report it has been stated that Mr. Saldanha who is the partner of Chef Cold Storage, confirmed that Mr. Vernon Lobo is the partner of Chef Cold Storage, and that his version was recorded. However, Mr. Travor Saldanha in his deposition in cross stated that he does not know any person by name William Fernandes, nor he had any contact with Cobra Detective and Security Services nor he was associated with the employer of Cobra Detective & Security Services in any manner whatsoever. This being the case, in the above circumstances, the report submitted by Cobra Detective & Security Services cannot be relied upon. The report submitted by the said agency is not supported by any evidence to indicate that the workman was the partner of Chef Cold Storage. In fact the main evidence in the case on this aspect is the evidence of Mr. Travor Saldanha who according to the employer was one of the partners of Chef Cold Storage. In his deposition he has stated that the partnership was entered into somewhere in the year 1982 and that besides him the other partner was Mrs. Gladys Francis Lobo, the mother of the workman. He has further stated that the said partnership was dissolved by deed of dissolution executed in Jauaury 1993, and that at the time when the partnership was entered into and at the time when it was dissolved he and said Mrs. Gladys Lobo were the only partners. He has stated in his cross examination that the letters dated 22-11-89 Exb. E-3 colly and the cash memo Exb. E-4 were issued by the other partner which supports the contention of the workman that he did not sign the said letters or the cash memo. He has also produced the profit and loss account (balance sheet) for the year ending 31-3-86, 31-3-88 and 31-3-89 Exb. 46 colly and has stated that remuneration paid to the partners in shown in the said balance sheets, marked at point 'A'. I have gone through the said balance sheets and I find that the name of the workman does not figure either as a partner or the Manager. The said balance sheets also do not show that any payment was made to the workman by way of remuneration, profit in the business or towards his salary. The charge against the workman is that as on the date when the charge sheet was issued to him he was the partner of Chef Cold Storage. This charge stands disproved from the evidence of Mr. Travor Saldanha the witness for the employer. The employer has examined one Mr. Raje, the legal officer of MAFCO Ltd. He is examined to proved that MAFCO Ltd., has filed a suit against Chef Cold Storage and the workman has been described as a partner of Chef Cold Storage and the workman who is impleaded as one of the defendants has been described as a partner of Chef Cold Storage. The Evidence of Mr. Raje and the documents namely, the plaint Exb. E-47 is of no help to the employer. The plaint by itself does not prove that the workman was a partner of Chef Cold Storage, though he is described as such therein. In his cross examination Mr. Raje has stated that a letter was received from the Registrar of Firms giving the names of partners and the workman was not shown as a partner of Chef Cold Storage. The employer has relied upon the advertisement which was published in the Newspaper "Navhind Times" Exb. E-2 and the application made by the workman to the Margao Municipality Exb. E-42 colly. The advertisement which was published was in connection with the application made by the workman for issuing licence and it was signed by him as a Manager. The workman has explained that since his mother and Mr. Travor Saldanha were in Bombay he made the application at the request of Mr. Saldanha and when Mr. Saldanha came down to Goa the workman resigned as Manager and the name of Mr. Saldanha was entered as Manager. The letter of Mr. Saldanha and the resignation letter have been produced at Exb. E-42 colly. Mr. Saldanha in his cross examination has stated that he became the Manager of Chef Cold Storage only for documentary purpose. the same thing would apply to the workman. In any event the charge against the workman is not that he was the Manager of Chef Cold Storage or that he was employed with Chef Cold Storage but the charge is that as on the date when the charge sheet dated 14-3-90 was issued to him he was the partner of Chef Cold Storage. Therefore, even otherwise the advertisement published in the news paper or the application made by the workman in the year 1982 to the Municipality is immaterial. Therefore from what is discussed above it can be seen that there is no evidence on record to show that the workman was the partner of Chef Cold Storage and thereby was gainfully employed during the time when he worked with the employer. I therefore, hold that the employer has failed to proved this charge of gainful employment against the workman. To sum up, I hold that the employer has failed to prove the charges against the workman that of falsification of reports and being gainfully employed when he was in the employment of the employer. I hold that the employer has succeeded in proving the charges against the workman that of disobeying the lawful and reasonable transfer order issued to him and that he was unauthorisedly absent from 4-4-89 to 3-3-90, which amounts to misconduct.

10. *Issue Nos. 5 & 6:* While deciding the issue No. 4, as regards the charge that the workman had remained absent unauthorisedly, I have held that the unauthorised absence of the workman for the period from 4-4-89 to 3-3-90 has been proved and also that the workman refused to comply with the transfer order issued to him. I have held that above said acts on the part of the workman amount to misconduct. Now the question is whether the order of dismissal passed against the workman is legal and proper, and if not what relief should be granted to the workman to find out whether the dismissal order is legal and proper, the nature of misconduct is to be considered as well as the other evidence on record. The workman was employed as a medical representative. It is an admitted fact that as a medical representative he had to promote sale of the products of the employer and for that he was required to visit the doctors and convince them about the products of the employer and he had to also visit the chemists and obtain orders from them concerning the

products of the employer. From the above, it is evident that the duty which is cast on the medical representative is of confidence as it is directly connected with the increase in the business of the employer. This being the case the workman is expected to work sincerely. The evidence on record shows that the workman had remained absent from 14-11-88 to 19-3-89 and the extension of leave for this period was not granted to him. There are letters and telegrams on record asking the workman to report for work, and informing him that extension of leave is not sanctioned to him. While deciding the issue No 4, I have held the absence of the workman for the above said period cannot be said to be unauthorised for the reason that since the employer paid the wages of the workman till March, 1989 there is a presumption that his leave was subsequently sanctioned. However, the fact remains that the workman had remained absent for the period from 14-11-88 to 19-3-89 though he was informed that the extension of leave was not granted to him and he was asked to report for work. As regards the absence of the workman for the period from 4-4-89 to 3-3-90, I have, held that his absence for this period is unauthorised because the workman failed to prove his sickness for the said period. Also, since the workman failed to prove that he was sick at the time when the transfer order was issued to him, I have held that there was refusal on the part of the workman to obey the transfer order. Thought it is held by me that gainful employment of the workman with Chef Cold Storage during the course of his employment with the employer has not been proved because the charge was that he was the partner to Chef Cold Storage and therefore gainfully employed still, the evidence on record, oral as well as documentary, shows that the workman had certain interest in the business of Chef Cold Storage and that the shop was not only the contact point of the workman as contended by him. This is evident from the fact that the workman has admitted in his cross examination that he had made some correspondence on behalf of the partners of Chef Cold Storage because Mr. Travor Saldanha, the partner, was always in intoxicated condition. Infact these suggestions ought to have been put by the workman to Mr. Saldanha when he was examined. However, no such suggestions were put to him. Another factor which is to be considered is that the workman has admitted that his mother had executed a Power of Attorney in his favour to manage the affairs of Chef Cold Storage on her behalf. It is also to be noted that on receipt of the transfer, the workman was insisting that he should be retained at Margao only and there is correspondence to this effect from the workman which is on record. The workman had gone to the extent of withdrawing the allegation made by him earlier against the Zonal Manager and the Marketing Manager, which was one of the reasons of his transfer to Aurangabad. The above facts are evidence from the letter dated 22-5-89 Exb. 35 from the workman in reply to the letter dated 11-5-89 Exb. E-34 from the employer informing to him about the transfer. All the above facts considered together go to show that the workman had some interest in the business of Chef Cold Storage and therefore he did not want work outside Margao. Therefore considering the nature of duties which the workman had to perform and the nature of the business carried on by the employer and his absence from work continuously for a period of more than one year, without any justification, I am of the view that this act of the workman is an act of serious misconduct. Also refusing to obey the transfer order which is lawful and reasonable is also an act of serious misconduct in the circumstance stated above. This being the case, I hold that the dismissal order passed by the employer against the workman is legal, proper and justified. In the circumstances, the workman is not entitled to any relief. Hence, I answer the issue No. 5 in the affirmative and the issue No. 6 in the negative, and pass the following order.

ORDER

It is hereby held that the action of the Management of M/s Himalaya Drug Company, Bombay, in dismissing Shri Vernon Lobo, Sales Medical Representative, with effect from 20-7-1990 is legal and justified.

No order as to costs. Inform the Govt. accordingly.

Sd/-
(AJIT J. AGNI)
Presiding Officer
Industrial Tribunal

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